IN THE

Supreme Court of the United States

October Term, 1971
No. 71-852

Supreme Court, U.S.
FILED
MAR 3 1972
E. ROBERT SEAVER, CLERK

C. D. CONSTRUCTION CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF.

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Respondent's Statement.

Respondent's brief is but a desperate attempt to efface the clear conflicts shown by the petition by speaking from a record which does not exist. His carefully studied and repeated misstatements of the findings constitute in fact an admission that he is unable truthfully to oppose the petition.

Thus, on page 3, he refers to the contractual interest of Fairmount in each of the two racing meets as "90 percent of *Charles Town's* profits from the meets." (Italics supplied.) The court below, however, specified

that interest as "90 percent of the profits [not *Charles Town's* profits] from the meets." (Pet. App. 2.)

The contract itself, moreover, being a wholly separate contract in the case of each meet, specified that interest as "ninety percent (90%) of the profits of the said meet." (Pet. App. 14.) Thus it is clear that Fairmount's interest was one, not in "Charles Town's profits", but in the profits of the meet itself, the particular meet, in each case.

Again, on the same page, respondent says that the determination of the Commissioner, in his deficiency notice, that the entire amount of the profits was taxable to Charles Town under "sections 61 and 482" of the Internal Revenue Code, was sustained in the *Charles Town, Inc.* case, 25 T.C.M. 77, affirmed, 372 F.2d 415. This is just untrue; the pages which respondent cites do not show this at all. The decision of each court below sustaining the deficiency against Charles Town sustained it solely and only under Section 482. (Pet. App. 35-37.)

Again, on page 4, respondent makes the same error, even more bluntly, when he says that the "Tax Court held that the Commissioner's *assessment* against Charles Town . . . rested on Section 61, as well as on Section 482." (Italics supplied.) He points to no page for this, and there is nothing in the record, nothing whatever, to show any assessment, or any authority of the Commissioner to assess,[1] prior to the determination of the Tax Court, and that rested solely on Section 482.

Similar and even worse deviations from the record appear in respondent's Argument, as shown below.

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[1]The authority of the Commissioner to assess is governed by Section 6213 (a) of the Internal Revenue Code.

Respondent's Argument.

Respondent makes no reference to the *First Security Bank* case, Docket No. 70-305 now pending in this Court. As of this writing, that case is still pending here. We merely renew the reference to it made in our petition and again urge that a review of our case would be helpful in arriving at a conclusion there. We reply now to the points made by respondent.

1. Respondent's argument begins, at page 5, with a clear *non sequitur*. It assumes that since what Fairmount made under each contract was an equity investment in a racing meet to be carried out by Charles Town, that it necessarily was an investment in *Charles Town's business*. In *Maple v. Commissioner*, 440 F.2d 1055 (C.A. 9) there was the same thing, an equity investment by one person in an operation carried out by another, with the investing person taking all the risk. In that event, the Ninth Circuit there held, the operation in which the equity investment is made is the *investing person's* business, here Fairmount's, not Charles Town's. Thus the holding here by the Court below that Fairmount's equity investment was an investment in *Charles Town's* business is in conflict with the decision of the Ninth Circuit in the *Maple* case, *supra*.

2. Respondent next says, page 6, in reference to the clear conflicts pointed out in the petition with certain cases arising under Section 482, that "both Courts below found that Charles Town's tax liability rested also on Section 61." He cites no page in the record for this and cannot; it is just not there. This is plain admission that the conflicts referred to are clear and are important.

3. In order to show that there is no conflict with *Stern v. Commissioner*, 357 U.S. 39, respondent asserts, at page 6, that both Courts below applied local law in determining that Fairmount was liable as Charles Town's transferee. Of course, both Courts agreed that local law was controlling, but there is nothing whatever to show that either Court actually applied it. On this we refer to our petition, pages 8-10. As there shown, the decision below is clearly in conflict with the local law. It follows that it is in conflict with this Court's decision in *Stern v. Commissioner*, *supra*.

Conclusion.

We submit again, in conclusion, that this case presents clear conflicts with decisions of this Court and decisions of other Courts of Appeal, and should therefore be reviewed. The presence of these conflicts is emphasized by respondent's desperate and bald attempt to blot them out by plain misstatements of the record.

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